

Benjamin Rosenthal, OSB No. 830828

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DANIEL ORME,

Plaintiff,

V.

**BURLINGTON COAT FACTORY
OF OREGON, LLC et al.,**

Defendants.

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) **CASE NO. CV 07-859-MO**
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) **PLAINTIFF'S AMENDED MOTION**
) **TO COMPEL THE PRODUCTION**
) **OF DEFENSE COUNSEL'S**
) **BILLING RECORDS IN SUPPORT OF**
) **PLAINTIFF'S FEE PETITION**
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) **(Expedited Hearing Requested)**
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I. CERTIFICATE PURSUANT TO LR 7.1

Plaintiff's counsel has conferred with Defendants' counsel, Clarence Belnavis, regarding this Motion and Defendants' counsel opposes this Motion.

II. MOTION

Plaintiff respectfully moves this Court for an order compelling the production of Defense counsel's billing records. This Motion seeks documents which indicate Defense Counsels' and their staff's hourly rate and the time expended in defense of Plaintiff's claims from the time Plaintiff brought his claims before the State of Oregon Bureau of Labor and Industries to the present.

Plaintiff seeks the forgoing records by close of business, Wednesday, February 3, 2010, so that they could be submitted to the Court in time for the filing of his Reply in Support of his Petition For Attorney fees and Costs.

Defendants have made the records relevant by their response asserting both that Mr. Rosenthal's hourly rate is excessive (Defendants' Response, p. 2) and the number of hours spent was not reasonably related to the asserted claims and he fails to exclude excessive or otherwise unnecessary matters. (Defendants' Response, p. 5).

Plaintiff's counsel first requested the records from Clarence Belnavis, Defendants' counsel on Tuesday, January 26, 2010. In the request, Mr. Rosenthal invited Mr. Belnavis to redact from the sought after records any information which would infringe on the Attorney/Client Privilege. Rosenthal Declaration, Attachment 1. Mr. Belnavis has declined providing such records articulating that "information concerning [his] fees will not cure" the Fee Petition. *Ibid*.

Defendants contend that both the hourly rate of Plaintiff's counsel and the time expended to the matter were excessive. Defendants' records are relevant to compare the efforts of Plaintiff's

counsel and his hourly rate with that of Defendants' staff of attorneys and assistants retained to defend those efforts to determine whether Plaintiff's hourly rate and time expended were reasonable.

Much of Plaintiff's time was necessary in reaction to Defendants' asserted defense. Defense counsel's time is relevant for purposes of comparing whether Plaintiff's expended time was reasonable. Defense counsel's hourly rate is relevant in that it would offer a comparative rate despite that defense counsel was not retained by the nonpayment risks inherent in a contingency fee arrangement. Because Defense Counsel was retained at an hourly rate - that rate should be lower than that charged by Plaintiff's counsel.

McGinnis v. Kentucky Fried Chicken of California, 51 F3d 805, 809 (9th Cir. 1994) required the discovery of defense counsel's records to determine whether Plaintiff's time expended on the case was reasonable. *McGinnis* took note of the vigor with which the case was unsuccessfully defended for purposes of determining whether Plaintiff's less expended time was reasonable. *See also Lubrizol Corp. V. Exxon Corp*, 957 F2d 1302, 1308-09 (5th Cir) *cert den.*, 113 S Ct 1302 (1992); *Henson v. Columbus Bank & Trust*, 770 F2d 1566, 1574-75 (11th Cir 1985)(Reversed the lower court's refusal to allow discovery of opponents' bills under abuse of discretion standard.)

The court also ordered discovery of defendant's time records as not attorney/client privileged in *Real v. Continental Group*, 116 FRD 211, 212-14 (ND Cal 1986) since the number of hours recorded by defendant's lawyers in pursuing questions in the case certainly related to the novelty and difficulty of questions presented by the case - a factor relevant in determining reasonable attorneys' fees. Moreover *Real* noted that Defense Counsel's hourly rate was relevant to

Plaintiff's fee petition since, among other things defense counsel's billing rate was partly indicative of the community's prevailing hourly rate. *Id* at 213; *See also In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir 1982)(a simple invoice requesting payment for unspecified services rendered reveals nothing more than the amount of the fee and would not normally be privileged.)

Based on the forgoing authority, Plaintiff seeks the discovery of Defense Counsels' and its staff's billable rate and the amount of time expended in defense of Plaintiff's claims.

This Motion is supported by the Declaration of Benjamin Rosenthal. This request is not made for the purposes of delay.

DATED: January 29, 2010

/s/Benjamin Rosenthal
Benjamin Rosenthal, OSB # 83082
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010 I, Brooke Zimet, electronically filed the foregoing **PLAINTIFF'S AMENDED MOTION TO COMPEL THE PRODUCTION OF DEFENSE COUNSEL'S BILLING RECORDS IN SUPPORT OF PLAINTIFF'S FEE PETITION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Brooke Zimet

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